Heritage Manor Convalescent Center, Inc. *and* **Linnell Key.** Case 7-CA-21792

27 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 13 September 1983 Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Heritage Manor Convalescent Center, Inc., Flint, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discharging or in any other manner discriminating against employees because of their union or other protected concerted activities."

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, we note that, in discussing employee Key's efforts to regain her job following a leave of absence, the judge commented in the section of his decision entitled "The Alleged Unfair Labor Practices," par. 11, "After an unsuccessful attempt to meet with [Director of Nursing] Reedy-Reed, Key left a message to which Reedy-Reed responded by phone on January 17." The judge should have noted there that Key's attempt to meet with Reedy-Reed occurred on 14 January, but that Reedy-Reed was not present during the hour or two that she waited. We do not find, however, that this clarification is sufficient to affect the judge's ultimate conclusions.

[2] The judge found, and we agree, that the Respondent violated Sec. 8(a)(1) and (3) of the Act by discriminating against Key because she engaged in protected concerted activity on behalf of the Union. However, he inadvertently failed to provide for an order requiring that the Respondent cease and desist from engaging in such unlawful conduct. Accordingly, we shall issue our customary order to remedy the violation found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or in any other manner discriminate against you because of your union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Linnell Key immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify Linnell Key that we have removed from our files any reference to the Employer's refusal to reinstate her and her termination in January 1983 and WE WILL notify her that this will not be used against her in any way.

HERITAGE MANOR CONVALESCENT CENTER, INC.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. This case was tried before me at Burton, Michigan, on July 27, 1983, pursuant to a complaint issued by the Regional Director on March 31, 1983, and an unfair labor practice charge filed by Linnell Key against Heritage Manor Convalescent Center, Inc., hereinafter called Respondent. The complaint alleges that Respondent refused to reinstate and discharged its employee, Key, in retaliation for her assistance to a labor organization in its processing of a grievance on behalf of another employee of Re-

spondent, thus violating Section 8(a)(1) and (3) of the Act. Respondent, by a duly filed answer, denied the commission of unfair labor practices.

At the trial before me the parties were given the opportunity to present relevant evidence, and to argue orally. The parties elected to file post-hearing briefs which were received about August 29, 1983.

Based on the entire record and my observation of the witnesses and their demeanor, I make the following findings.

I. JURISDICTION

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan. At all times material herein, Respondent has maintained its principal office and facility at G-3201 Beecher Road, in the city of Flint, and State of Michigan, herein called the Flint facility. Respondent is, and has been at all times material herein, engaged in providing long-term geriatric care services. Respondent's facility located in Flint, Michigan, is the only facility involved in this proceeding. During the year ending December 31, 1982, which period is representative of its operations during all times material hereto, Respondent in the course and conduct of its operations had gross revenues in excess of $250,000 and purchased and caused to be transported and delivered to its Flint facility medical supplies and other goods valued in excess of $5,000, which were transported and delivered to said facility in Flint, Michigan, and received from other enterprises located in the State of Michigan, each of which other enterprises had received the said goods delivered to Respondent directly from points located outside the State of Michigan.

It is admitted, and I find, that Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that Local 3110, American Federation of State, County and Municipal Employees, AFL–CIO, herein called the Union, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent maintains a geriatric care facility at Flint, Michigan, where it employs, inter alia, nurses (registered nurses, i.e., RNs, and licensed practical nurses, i.e, LPNs), nurses aides, and other service employees and maintenance employees. At the times material herein, Respondent's service and maintenance employees, excluding the nurses, were represented by the Union. Respondent's supervisory hierarchy in approximate descending order was Shellee Almquist (administrator), Valerie Jackson (head of personnel), Joan Reedy-Reed (nursing director), and the shift coordinators, one of whom was Lizzie Pitts (second-shift coordinator).

Linnell Key entered on duty on July 20, 1982, and was assigned to the facility's third floor as a second-shift LPN. She was actively employed until November 25, 1982, at which time she was placed on a leave of absence pursuant to her own request and with the approval of Respondent.[1] Subsequently, she sought to reactivate her employment in December, was refused, and was ultimately terminated in January 1983. The General Counsel premises this case upon the testimony of Key which, in very limited but critical areas, is corroborated by a credible former employee charge nurse, Jacqueline Cabell. Respondent adduced the testimony of Pitts, Reedy-Reed, and primarily, with respect to Respondent's practice of terminating unsatisfactory employees, that of Almquist. Key's testimony conflicts with that of Pitts and Reedy-Reed in many areas. Wherever there is an inconsistency between that of Key and Respondent's witnesses, I credit Key who, although a slow and deliberate speaker, exhibited a more convincing demeanor marked by a higher degree of certitude, confidence, responsiveness, and spontaneity. Her testimony was in much more of a narrative, detailed manner than that of Pitts and Reedy-Reed who were cryptic, generalized, conclusionary, and, particularly with respect to the alleged deficiencies of Key's work performance, unsupported by detail and context. Moreover, their testimony was inconsistent and at times in outright contradiction to Respondent's own personnel records and personnel reports which the witnesses themselves had authored, and was inherently improbable in light of Respondent's own documentary evidence.

Respondent maintains a progressive evaluation system, at least with respect to its nurses, i.e., a new nurse is subjected to an orientation evaluation soon after hire, a 30-day evaluation, and a "60 day" evaluation on the completion of 90 days of employment. Respondent's documentary evidence reveals that there is a probationary period for LPNs of 90 days. The credible evidence in this case, including Respondent's own personnel file evaluation, reveals that Key was determined early in her employment to be an LPN of limited ability who, however, did well in the function of distributing, i.e., "passing medications," to the patients. Her personnel file identifies her as a medication nurse and the personnel files of other LPNs also identify them as holding the position of "medication nurse." Thus Key's testimony that her position was to be that of the limited responsibility of medication nurse is far more credible than that of Respondent's witnesses who, despite Respondent's own documentary evidence, insisted that it had no such employment position, and that Key was employed with the objective of mandatory progression to the full responsibilities of an LPN. Clearly, Key's deficiencies, if they existed, with respect to such full responsibilities were not found to have precluded Respondent from retaining her beyond the 90-day probationary period with the caveat noted on her evaluation form of October 28 by Head of Personnel Jackson:

> Linnell Key has ability to do one task at a time. Limited amt. of responsibility can be given and must continue to have strong supervision.

[1] All dates herein are 1982 unless otherwise noted.

She was graded, however, essentially as satisfactory in the check box graduation system of that form, i.e., "standard," the third gradation among (1) unsatisfactory, (2) weak, (3) standard, (4) good, and (5) outstanding, with respect to 31 specific items grouped under the categories of "Personal Relations," "Work Habits," "Quantity," "Quality," "Adaptability," and "Initiative." Pitts attempted to explain away what on its face is a satisfactory evaluation by testifying that she based her grading on Key's limited performance as a passer of medications but that as a full LPN she would have received an unsatisfactory rating and thus her employment status was in jeopardy. Such testimony is incomprehensible and patently disingenuous. Clearly Key was to be rated as either a satisfactory or unsatisfactory *employee*. Her evaluations indicate that as an employee she was found to be of limited but of sufficient value as a medication nurse to be retained by Respondent. Contrary to the documentary evidence submitted by Respondent as to its terminations of unsatisfactory LPNs, including medication nurses (one of whom was terminated at the 90-day evaluation), her evaluations reveal no specific identified deficiencies, no demotions, no warnings, no discipline, etc. I conclude that the procedures utilized with respect to evaluating unsatisfactory nurses were not utilized for Key's evaluations.

Key was not only retained beyond her probationary period, but she was assigned, on occasions, to perform some of the limited functions of the more responsible charge nurse position and, on November 5, she received a pay raise. I credit Key's testimony that she was not criticized with respect to the performance of her duties of medication nurse, nor was she ever given any indication that her lack of progress was such as to put her job in jeopardy. I find that, as of October 28, her employment was not jeopardized by deficient work performance.

Key testified that about November 15 she decided to resign in order to return to Mississippi to care for her mother who had been stricken with illness. Upon inquiring of charge nurse Cabell as to the procedures of resigning, she sought a termination form. However, before she executed that form, she engaged in a conversation at the facility's fourth floor nurses station with Reedy-Reed in Cabell's presence, wherein Reedy-Reed, after joking with Cabell about Cabell's own departure for another job, turned to Key and urged her to take a leave of absence instead of resigning. Key acted on that suggestion and with Respondent's approval, instead of resigning, took a leave of absence which was to commence on Monday, November 29, following the last day of work on Friday, November 26.[2]

Key was unable to report for work on November 26 and, with Respondent's permission, did not do so. The testimonial evidence of all witnesses fixes her last day of work as November 25. A personnel action form in Respondent's files reveals a recordation dated November 23 that Key received an excused leave of absence from November 27 to an indeterminate date with the following notation:

> Emergency family illness (Mother—Mississippi) possibility of not returning to March. Gave up apartment in Flint—leaving immediately.

On November 27, Key telephoned Respondent's facility and talked to Martha Armstrong, a nurses aide, for the purpose of borrowing her automobile. Pursuant to a message left with Armstrong, Key next talked to union steward Anna Williams on the telephone. Williams informed Key that a unit employee, aide Randi Woodring, had been discharged in consequence of events of November 11, on the third floor on Key's shift, i.e., Woodring allegedly left her duty station without permission. Williams asked Key what transpired that night and asked whether Woodring in fact had left the facility and whether she had permission to leave. Key responded that she had left but that she did have permission to leave.

Key testified that, on the night of November 11, Woodring had requested Pitts' permission to leave because of illness and was told that she could do so after finishing certain prescribed tasks, and that thereafter, having finished those tasks and in the absence of Pitts, she so informed Key and stated that she was ready to leave. Key told her to "go ahead on."

During the telephone conversation with Williams, Key told her that she was to depart for Mississippi on November 29. Upon Williams' request, Key agreed to write out a statement as to the events of November 11 concerning Woodring. Key wrote out such statement and, on November 28, delivered it to Williams at the facility where Key had gone to meet Armstrong for the purpose of borrowing a car. On November 27, Key unsuccessfully sought to communicate with Reedy-Reed by telephone concerning the statement to the Union and left a message with the receptionist, but thereafter received no return call. The message did not specify the nature of the matter she sought to discuss. Key did not attempt to see Reedy-Reed on November 28.

On November 29, Key departed for Mississippi. About December 8, Key telephoned Reedy-Reed and stated that because of an improvement in her mother's health she desired to return to her job on the first of January 1983. However, Reedy-Reed reported that she was in possession of Key's letter to the Union concerning Woodring and asked whether Key had in fact written it and asked why she had done so. Key answered that she wrote the letter because she had been requested to do so. Reedy-Reed then stated that she had been placed in a difficult situation because Key had taken a leave of absence and two other nurses had resigned, thus causing her to hire new employees. Reedy-Reed, however, told Key that she would "see" about Key's job on Key's return to Michigan.

Key returned to Michigan on December 18. After an unsuccessful effort on December 20, Key contacted Reedy-Reed on December 21 and, again, asked for her job back, stating that she was available as soon as desired. Reedy-Reed again referred to her difficult situation regarding scheduling and told Key to give her 2 weeks

[2] Reedy-Reed did not recall such a conversation but did not deny that it occurred. As noted above, I credit Key.

to get her back into the schedule. Key testified that about January 3 she visited the facility in order to get certain forms executed on the instructions of the local social service department from whom she sought assistance. One of those forms related to an application for state unemployment compensation. After some delay Key finally was permitted to speak with Reedy-Reed and they discussed the unemployment compensation application. Reedy-Reed agreed to fill out the forms and told Key to leave them. The status of her job was not discussed. After an unsuccessful attempt to meet with Reedy-Reed, Key left a message to which Reedy-Reed responded by telephone on January 17. Reedy-Reed asked why Key had been to the facility. Key told her that she desired her job again. Reedy-Reed then stated in apparent reference to some document before her, "Well, I see here that your work hasn't improved." On questioning, Reedy-Reed told her that she had not performed certain tasks and some discussion transpired as to whether those tasks were to have been expected of her as a medication nurse. Reedy-Reed then asserted that she had shown no improvement. Key then protested that Reedy-Reed was not stating the true reason for the refusal to reinstate her. Reedy-Reed asked, "Well, what is the reason?" Key stated, "It's the statement that I wrote and Randi Woodring got her job back." Reedy-Reed then admitted that "Yes, that is the reason" and further told Key that she "didn't have any business in union business" and that it was "handled all wrong because Anna Williams should have" come to Reedy-Reed and not to Key. The discussion then turned to Key's unemployment compensation claim. Key asked why Respondent was resisting it. Reedy-Reed suggested that Key resign in order to obtain unemployment compensation. Key retorted that she wanted her job back. Reedy-Reed stated with respect to the unemployment compensation claim, "I will look into it."

On January 28, after several unfruitful efforts to respond to messages to telephone Reedy-Reed, Key conversed with Reedy-Reed by telephone and was told that she was terminated.

At different times Respondent has proffered several varied reasons for the termination of Key. As seen above, to Key directly, Respondent stated at different times that she was not being reinstated because of scheduling problems caused by her leave of absence, despite the fact that she was urged to take a leave of absence rather than to resign, and she was also told that she was not being reinstated because of an inadequate work performance, and because of her cooperation with the Union.

In a response to the Michigan Employment Security Commission dated January 18, 1983, Almquist set forth that Key had not been reinstated from a leave of absence and had instead been terminated because of:

> (1) Improper behavior for professional nurse.
>
> (2) Unprofessional attitude and performance.
>
> (3) Lack of support for Nsg. Adm. and administration.

In a personnel memorandum dated January 6, 1983, written and signed by Reedy-Reed and attached to the above report, it is set forth that in mid-December, Key telephoned her request of Reedy-Reed for reinstatement but was told by Reedy-Reed that because Key had moved out of State and taken an indefinite leave of absence "her position had been filled" and that "Due to various conduct and call off of assignment [sic], Director felt a need to not have Linnell return to facility since a great deal of time was spent reassigning personnel to allow Linnell her request." Thus, according to this statement, Key was denied reinstatement from a leave of absence because she took an approved leave of absence. No specific acts of insubordination or misconduct were set forth therein. Reedy-Reed in a personnel memorandum dated January 21 noted that Key had appeared at the facility but had not as yet been informed that she was terminated.

In testimony at this trial Reedy-Reed suggests that it did not come to her attention that Key's prospects of "improving" her performance were so negligible as to warrant termination until after a leave of absence had been approved. Thus, according to her testimony, although she decided to terminate Key on November 25, she decided not to communicate that decision in order to avoid an ugly situation that was mooted by an indefinite leave of absence to which there appeared to be no prospect of return. The vehicle which caused her to decide that Key was no longer a desirable employee was, according to Reedy-Reed's testimony, an evaluation, i.e., a handwritten memorandum purportedly received from Pitts on November 25.

Pitts testified, as noted above, that Key was a severely deficient employee but that Pitts had some hope of improvement but that an event of November 9 caused her to reassess this hope. As noted above, I discredit her testimony that Key had been in fact so deficient that, absent improvement, she would be terminated. However, Pitts testified to an event concerning a patient whose condition appeared to deteriorate to the point of life-threatening conditions. The gist of Pitts' testimony is that Key was deficient with respect to advising Pitts of the condition of the patient and that Key was nonresponsive or slow to react. Although I discredit Pitts, assuming that the event occurred as testified to by Pitts, there is no explanation as to why Pitts waited until November 25 to draft a report to Reedy-Reed, nor any explanation as to why Key was not reprimanded or warned immediately. Furthermore, no reference to that incident was made in Reedy-Reed's memorandum attached to the response to the Michigan Unemployment Compensation Commission. The record is barren of any precipitating factor for the report that is alleged to have been drafted and submitted on November 25. It is not a formal evaluation. It follows the formal 90-day evaluation and successful completion of probation by less than a month. There is no testimony that Reedy-Reed requested any such report. There is no evidence that such reports are customary when employees take leaves of absence. There is only an affirmation of a leading question by Pitts that the report is "kept in the ordinary course of business." The November 9 inci-

dent was certainly too remote in time to have been the precipitating factor and is buried therein amidst numerous other complaints. The report itself contains a litany of deficiencies that appear to cover the entire period of Key's employment but which are not specified as to date, place, or context of the event. To the extent that Key was able to contradict the generalized testimony of Pitts that accompanied this document, I credit Key. In any event, the document clearly covers periods of time covered by prior favorable reports and encompasses complaints of conditions that had long been accepted by Respondent, e.g., Key's handicap in hearing and vision induced by a pre-hire, pre-Mother's Day gunshot wound inflicted by her husband during her attendance at LPN school. Indeed, Key's "personal tragedy" had been sympathetically noted in earlier evaluations, but now it suddenly became a source of complaint. Yet the record is barren of evidence of any precipitating events about November 25, to have caused such a report. Furthermore, if such report existed in November, Reedy-Reed's failure to confront Key with it in the mid-December telephone conversation, and her reference instead to scheduling problems, is inexplicable.

Also remarkable is that, despite the castigation of Key's work performance therein, Pitts concluded in that report not with a recommendation of termination but rather that Key be utilized "only as a 3rd floor medical nurse under the supervision of another nurse." I conclude that the document is a contrivance, and I discredit the testimony of Pitts and Reedy-Reed that it was composed and drafted on November 25, or that it was the product of a genuine reaction to Key's work performance.

Yet another variation of proffered reasons for Key's termination can be found in Respondent's personnel memorandum form dated January 18, 1983, and signed by Reedy-Reed. The form reflects that Key was terminated due to

> (1) Unprofessional behavior toward House supervisor [Pitts]
> (2) Attitude
> (3) Incomplete job responsibility
> Visitor Rapport
> Dr. Orders not taken
> Phone Conversations Not Completed

In testimony Reedy-Reed explained that item number (1) did not refer to any act of direct personal insubordination or affrontery to Pitts, but rather it referred to the aforementioned patient incident of November 9 in that allegedly Key did not have an explanation as to negligence in failing to assist Pitts. I credit Key that she did respond to Pitts appropriately during that incident and was not criticized at the time. With respect to item number (2) "attitude," Pitts testified in generalized, unparticularized terms that Key manifested a "non-committal" attitude, i.e., indifference when "approached about following some orders or a phone conversation." She testified without specification that this conclusion was based on reports from persons she did not identify on dates she did not specify. She failed to indicate that this manifestation of indifferent attitude was a recent development. There is no evidence of such reports to report this testimony. The third item, she testified, was based on Pitts' purported report of November 25. There is nothing in that evaluation nor any earlier evaluation that sets forth any incident relative to Key's rapport with visitors.

Finally, Respondent's original answer to the complaint, prior to amendment at the hearing, states as an affirmative defense:

> A. The Charging Party voluntarily severed her employment with the Employer by failing to return from a leave of absence which was scheduled to begin on Friday, November 26, 1982.
>
> B. That the Employer's decision not to rehire Charging Party was justified based on her poor job performance, lack of skills, insubordination, and violation of the Employer's work rules and regulations.[3]

Analysis

Respondent takes the position that the decision to discharge employeee Key was "based on her poor performance and lack of abilities." Respondent argues that the General Counsel has failed to sustain the burden of proving that Key was discharged because of any union or protected activities and that good grounds existed for the discharge of an unsatisfactory employee, and that there is insufficient evidence of animosity toward any protected activities of Key and no causal relationship was shown between the alleged protected activities of "employee" Key and the termination.

As stated in *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that it is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be any more naif than is a judge. [Footnote omitted.] If he finds that the stated motive for discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

The Board stated in the *Wright Line* case:[4]

[3] At trial Respondent amended its affirmative defense to the more general: "[Respondent] would have released Linnell Key from employment, in any event, and for valid reasons without regard to any concerted protected activity.

[4] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 622 F.2d 887 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

> . . . we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Very recently the Supreme Court was presented with the question of "whether the burden placed on the employer in *Wright Line* is consistent with Section 8(a)(1) and 8(a)(3) and with Section 10(c) of the [Act] which provides that the Board must prove an unlawful practice by a 'preponderance of the evidence'" [citation of Section 10(c) omitted]. The Court answered that question affirmatively and thus approved of the *Wright Line* test of proof. The Court concluded that in the application of that test in the case before it that the Board's finding of violation "was supported by the substantial evidence on the record considered as a whole [citation omitted]."[5]

Based on the foregoing findings of fact, I conclude that the General Counsel has established that the proffered reasons for the discharge of Key were shifting, inconsistent, contradictory, false, and pretextuous. Even if I were to exclude from consideration Key's credited testimony of Reedy-Reed's admission that Key refused reinstatement because she had submitted a statement to the Union that led to the reinstatement of a discharged unit employee, I would necessarily infer that such was the sole motivating factor for the discharge. The reasons advanced for the discharge were false and pretextuous. But even if grounds existed for concluding that Key was a deficient employee, Respondent deviated from past practice by which it discharged an unsatisfactory nurse at the end of the probation period and then only on detailed documentation of the employee's failings and after having first reprimanded and warned the employee. Respondent was aware, as evidenced by Reedy-Reed's own testimony, prior to her termination of Key's submission to the Union of a statement of fact concerning a discharged bargaining unit employee.

Therefore, because of the sequence of events and in light of the pretextuous nature of the proffered reasons for the discharge, it must be inferred that Key was terminated solely because of her assistance to the Union. At the very least, I find that the General Counsel has adduced overwhelming evidence that the protected activities were a motivating, if not sole, factor, and I further find that Respondent has not sustained the burden of demonstrating that the same actions would have taken place even in the absence of that assistance.[6]

The final troubling factor in this case is whether or not Key was protected by the Act with respect to her conduct for which she was terminated. Respondent at no time alleged or argued that Key was a supervisory employee, or that she breached some fiduciary obligation by her conduct with respect to the early release from duty of aide Randi Woodring. If anything, Respondent argues that there is insufficient evidence that the statement by Key was of any consequence to the grievance procedure. Thus, it does not argue that Key breached any supervisory duties, nor any duty which required her to report first to Respondent the details of the Woodring incident. Nor does it contend that Key, by failing to report to it those same events, in any way undermined Respondent's position vis a vis the Union.

There is some generalized testimony adduced in cross-examination of Key that she, by virtue of holding the position of an LPN, possessed some limited responsibility with respect to the aides, i.e., instruction, directions as to the assisting of patients, as spontaneously ascertained by Key while on her medication rounds, and the reporting of noncompliance with same to her supervisors as well as reporting unsatisfactory work by aides, e.g., abuse of patients. Such responsibility, however, involves the use of professional judgment incidental to care and treatment of patients and not the "exercise of authority in the interest of the employer," so as to constitute supervisory status. *Beverly Manor Convalescent Centers*, 264 NLRB 966 (1982) (and cases cited therein). Although there is some cryptic testimony adduced on cross-examination of Key that she had the unexercised authority to "reprimand or write up [aides]" who failed to satisfy the needs of a patient as expressed to the aides by Key, there is no evidence that such authority extended to anything more than a reportorial duty; *Pine Manor Nursing Home*, 238 NLRB 1654 (1978). With respect to the so-called reprimand, there is no evidence of what significance that would have had with respect to the impact on the aides' work status, or whether it was subject to independent investigation by her superiors. Finally, there is no evidence that the releasing of an aide from duty, particularly the release of Woodring, was within Key's sphere of authority, or whether if it was not, it constituted interference with Pitts' orders for which discipline was warranted. In any event, from Key's testimony it appears that Key at most agreed with Woodring's estimate that she had complied with the outstanding preconditions for early release as specified by Pitts and was therefore free to leave.

The Board has held that supervisors as defined by the Act are not protected in the engagement of union activities, *Greenbrier Valley Hospital*, 265 NLRB 1056 (1983). I conclude, based on the foregoing facts, and with the apparent position of Respondent, that Key was not a supervisory employee. Accordingly, it is unnecessary to evaluate whether as a supervisor she was nonetheless entitled

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[5] *NLRB v. Transportation Maintenance Corp.*, 103 S.Ct. 2469 (1983).

[6] As Respondent correctly points out, the General Counsel failed to adduce evidence as to the materiality of the Key statement to the grievance, or whether it was in fact utilized by the Union. Moreover, although Respondent does not dispute it, no direct evidence was adduced as to whether a grievance had in fact been filed, or as to the disposition of it except for Reedy-Reed's admission to Key that her letter written to the Union which caused the reinstatement of an employee was the reason for her termination. However, regardless of the ultimate use to the Union of that letter, it is established that Reedy-Reed acknowledged a perception by Respondent that Key wrote a letter to the Union which led to the reinstatement of a unit employee. In any event, regardless of the value of Key's union assistance, it is nonetheless union assistance.

to protection by virtue of her giving information to the Union relative to an actual or potential grievance.[7] I further conclude on the facts in this record that as a nonsupervisory employee she occupied no special fiduciary relationship by which she would have been obliged to withhold information from the Union until she had first reported to Respondent.

I further conclude that, by giving assistance to the Union with respect to the Woodring incident, Key, although not a unit employee, had engaged in protected union activity. I agree with counsel for the General Counsel's argument that the grievance activity of a union is a basic protected activity and that discriminatory conduct against unit or nonunit employees induces all employees' fears that it will be less efficient and further that such conduct is destructive of incentive to union membership and violative of Section 8(a)(1) and (3) of the Act. Regardless of whether a grievance was formally instituted with respect to Woodring or the actual value of Key's statement, it is clear that Respondent herein engaged in discriminatory conduct which tended to impair the Union's ability to investigate and gather information relative to its representational status. Such discriminatory conduct equally discourages union membership and union activities. I therefore conclude that by its refusal to reinstate and its termination of Key, Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3), set forth in section III of this decision.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully refused to reinstate and terminated Linnell Key, I shall recommend that Respondent be ordered to offer her reinstatement to her former or substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed and make her whole for any loss of earnings that she may have suffered thereby with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[8] I shall also recommend that Respondent expunge from its records any reference to the unlawful refusal to reinstate and termination of January 1983, and notify her in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against her.

On these findings of fact and conclusions of law, I make the following recommended[9]

ORDER

The Respondent, Heritage Manor Convalescent Center, Inc., Flint, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act by refusing to reinstate them or terminating them for engaging in activities on behalf of Local 3110, American Federation of State, County and Municipal Employees, AFL-CIO.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Linnell Key reinstatement to her former or substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of pay she may have suffered as a result of the January 1983 discrimination, computed in the manner set forth in the section of this decision entitled "The Remedy."

(b) Expunge from its files any reference to the refusal to reinstate and termination of Linnell Key and notify her in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll and all other records required to ascertain the amount of any backpay due under the terms of this Order.

(d) Post at its Flint, Michigan facility copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply.

[7] See *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), wherein the Board notes exceptions to its ruling, one of which involves supervisors who testify for a union during the processing of a grievance.

[8] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."